UNITED STATES DISTRICT COURT EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

STATE OF ALABAMA AND THE ALABAMA	_)	
DEPARTMENT OF ENVIRONMENTAL)	
MANAGEMENT, COMMONWEALTH OF)	
KENTUCKY, STATE OF NORTH CAROLINA)	
ex rel. ATTORNEY GENERAL ROY COOPER,)	
and STATE OF TENNESSEE,)	
)	
Plaintiffs,)	Civil Action No. 3:11-cv-00170
)	
v.)	
)	
TENNESSEE VALLEY AUTHORITY,)	
)	
Defendant.)	
)	
	_	
NATIONAL PARKS CONSERVATION)	
ASSOCIATION, INC., SIERRA CLUB, and)	
OUR CHILDREN'S EARTH FOUNDATION,)	
,)	
Plaintiffs,)	
,)	
v.)	Civil Action No. 3:11-cv-00171
	j	01/11/12/12/11/19/01/11/07
TENNESSEE VALLEY AUTHORITY,)	
)	
)	
Defendant.)	
Doronguit.)	

JOINT MOTION TO ENTER CONSENT DECREE

All of the parties in this consolidated matter respectfully move this Court to enter the Consent Decree lodged on April 14, 2011 (the "Consent Decree" or "Decree"). In these two consolidated cases, the plaintiffs allege that the Tennessee Valley Authority ("TVA") violated the Clean Air Act on numerous occasions. TVA denies those allegations. The complaints in the

two consolidated cases are based on essentially the same set of actions. The plaintiffs in Case No. 3:11-cv-00170 are the States of Tennessee, Alabama, Kentucky, and North Carolina (hereinafter "the Plaintiff States"). The plaintiffs in Case No. 3:11-cv-00171 are the National Parks Conservation Association, Sierra Club, and Our Children's Earth Foundation (hereinafter "the Citizens"). The single Consent Decree, which is the subject of this motion, resolves both actions.

Significantly, the Consent Decree before the Court is identical in all material respects to a Federal Facilities Compliance Agreement ("FFCA") entered into between TVA and the United States Environmental Protection Agency ("EPA"). Indeed, the FFCA and an associated document, an administrative Consent Agreement and Final Order ("CAFO"), are referred to in the Consent Decree and are attached to the Decree as exhibits. The FFCA and CAFO were signed the same day as the Consent Decree. The final signed Consent Decree, which the parties now ask this Court to enter, is appended to this motion as Attachment 1. The final, effective TVA-EPA agreements are included as part of Attachment 1 as exhibits to the Consent Decree.

This Consent Decree, along with the companion EPA-TVA agreements, resolve an underlying dispute over TVA's Clean Air Act compliance that has lasted over a decade. As shown below, because the lodged Consent Decree is fair, adequate and reasonable, and in the public interest, the parties respectfully move for its entry.

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¹ Attachment 1 differs slightly from the version of the Consent Decree that was lodged in the following respects. First, a signature page was inserted for the Court at page 97, which was previously a blank page. Second, at page 9, paragraph 14, the Parties have inserted the appropriate date in the blank space. Third, the CAFO, which is Exhibit 2 to the Consent Decree, has been fully executed and the finalized document has been included as Exhibit 2. Fourth, changes to several nonsubstantive pages (the case caption, the table of contents, and cover pages for various exhibits) have been made to reflect the facts that the two cases have been consolidated and that the CAFO has been finalized. Finally, one very minor formatting error was corrected.

I. BACKGROUND

A. The Facilities at Issue

TVA is a federal agency and corporation owned by the United States government, created and existing pursuant to the Tennessee Valley Authority Act of 1933, 16 U.S.C. §§ 831-831ee.

TVA operates a total of 59 coal-fired boilers at eleven plants in Tennessee, Kentucky, and Alabama. The total coal-fired system capacity is around 17,407 megawatts. TVA also operates nuclear, natural gas, and hydroelectric plants. TVA's service territory includes parts of the States of Alabama, Georgia, Kentucky, Mississippi, North Carolina and Virginia, and almost all of Tennessee. TVA provides wholesale power to 155 municipal and cooperative power distributors and direct service to 56 large industrial and government customers, thereby supplying power to about nine million people across its 80,000 square mile territory. TVA does not receive any public tax dollars.

The Consent Decree covers all eleven of TVA's coal-fired power plants, which are the:

- Allen Fossil Plant near Memphis, Tennessee;
- Bull Run Fossil Plant near Oak Ridge, Tennessee;
- Colbert Fossil Plant in Tuscumbia, Alabama;
- Cumberland Fossil Plant in Cumberland City, Tennessee;
- Gallatin Fossil Plant in Gallatin, Tennessee;
- John Sevier Fossil Plant near Rogersville, Tennessee;
- Johnsonville Fossil Plant near Waverly, Tennessee;
- Kingston Fossil Plant near Kingston, Tennessee;
- Paradise Fossil Plant in Drakesboro, Kentucky;

- Shawnee Fossil Plant near Paducah, Kentucky; and the
- Widows Creek Fossil Plant near Stevenson, Alabama.

B. The Pollutants at Issue

The combustion of coal produces three pollutants that are particularly relevant to this matter: sulfur dioxide (SO_2), oxides of nitrogen (NO_X), and particulate matter ("PM"). In turn, after they are emitted from the stacks, NO_X reacts with other compounds to form ozone and SO_2 and NO_X form microscopic particles known as fine particulate matter ("PM_{2.5}"). According to EPA, once inhaled, fine particles can lodge deep in the lungs, leading to a variety of health problems and even premature death. EPA states that these compounds and particles are also associated with other health and environmental effects, as follows:

Sulfur Dioxide – High concentrations of SO₂ affect breathing and may aggravate existing respiratory and cardiovascular disease. Sensitive populations include asthmatics, individuals with bronchitis or emphysema, children and the elderly. Sulfur dioxide is also a primary contributor to acid deposition, or acid rain.

Nitrogen Oxides – The most notable health effects of ambient NO_X derive from the formation of ground-level ozone. Ground-level ozone exacerbates asthma, scars lung tissue, and can lead to permanent and significant reductions in lung function. Children, people with lung diseases such as asthma, and people who work or exercise outside are susceptible to the adverse effects of ground-level ozone. Nitrogen oxides also contribute to acid deposition and all of the effects of $PM_{2.5}$.

Fine Particulate Matter – Short term exposure to fine particulate matter can aggravate lung disease, cause asthma attacks and acute bronchitis, may increase susceptibility to respiratory infections, and has been linked to heart attacks. Fine particulate matter also is a major factor in

visibility impairment in the form of regional haze in the southeast United States, including the Great Smoky Mountains National Park.

II. REGULATORY FRAMEWORK

The Prevention of Significant Deterioration ("PSD") provisions of the Clean Air Act are contained in Part C of Title I of the Act, 42 U.S.C. §§ 7470-7492, and are designed to prevent the significant deterioration of air quality in those areas that have already attained the National Ambient Air Quality Standards ("NAAQS"). The analogous, but more stringent, Nonattainment New Source Review ("Nonattainment NSR") requirements contained in Title I, Part D of the Act, 42 U.S.C. §§ 7501-7515, are designed to restore air quality in areas that fail to meet the NAAQS. Those areas which cannot be classified due to insufficient data are termed "unclassifiable" and are governed by the PSD requirements. The PSD and Nonattainment NSR programs collectively are referred to as the New Source Review program ("NSR program").

The NSR program requires an owner or operator constructing a major emitting facility to obtain a permit containing emission limitations for the facility. The emission limits in the permit, for each pollutant subject to regulation, must be reflective of "best available control technology" ("BACT") under the PSD program if the source is in an attainment area, or "lowest achievable emission rate" ("LAER") pursuant to the Nonattainment NSR provisions if the source is in a nonattainment area. 42 U.S.C. §§ 7475(a)(4) (PSD), 7503(a)(2) (Nonattainment NSR). These same permitting requirements apply when an existing source undergoes a "major modification," which generally is defined as "any physical change in or change in the method of operation of a major stationary source that would result in . . . a significant net emissions increase" in a pollutant that is subject to regulation. *See* 40 C.F.R. § 51.166(b)(2). The regulations, implemented through State Implementation Plans, further specify that to be

"significant" the net increase in emissions of any pollutant must exceed the threshold amount for that pollutant. As relevant to this case, those thresholds are 40 tons per year of NO_X , 40 tons per year of SO_2 , and 25 tons per year of PM. *Id.* § 51.166(b)(23).

The PSD rules generally require a person who wishes to undertake a major modification of a source to demonstrate, before the modification commences, that the modification will not cause or contribute to air pollution in violation of any NAAQS or any specified incremental amount of ambient air pollution. 42 U.S.C. § 7475(a)(3). Major modifications subject to the Nonattainment NSR program may not proceed unless the increased emissions are offset on at least a 1:1 basis with reductions from other sources. 42 U.S.C. § 7503(a)(1)(A). Other permitting requirements, in addition to the BACT and LAER mandates, also apply to sources seeking permits under the PSD and Nonattainment NSR programs.

Some States also maintain regulatory programs known as "minor NSR" that apply in addition to the federally-required NSR program. All three regulating States in this case – Alabama, Kentucky, and Tennessee – maintain minor NSR programs.

Another Clean Air Act program that is relevant to this matter is the New Source Performance Standards ("NSPS") program. Through Section 111 of the Clean Air Act, 42 U.S.C. § 7411, Congress required EPA to promulgate emissions standards applicable to certain categories of sources. EPA has promulgated NSPS for the category of electric utility steam generating units. 40 C.F.R. Part 60 Subpart Da. These standards apply to both new and modified sources in that category. The term "modification means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source" 42 U.S.C. § 7411(a)(4). The specific rules governing modifications can be found at 40 C.F.R. § 60.14.

Finally, requirements included by States in the permits issued under the programs discussed above must be carried over into operating permits (also known as "Title V" permits), which are governed by the 1990 Amendments to Title V of the Clean Air Act and state law.

Each of TVA's coal-fired power plants is required to and does have a Title V permit.

III. VIOLATIONS ALLEGED IN THE COMPLAINTS

The complaints allege that TVA modified a number of coal-fired units at nine of its plants. The physical changes alleged in the complaints are the following:

- In 1982, TVA repaired and replaced portions of the Colbert Unit 5 boiler. TVA replaced and redesigned the waterwalls and horizontal reheater and modified the startup system.
 TVA added wingwalls to the superheater and replaced the gas proportioning dampers, the windbox, and the control system. TVA also converted the unit to a balanced draft configuration. This project cost TVA over \$50 million and took over thirteen months to complete.
- In 1984 and 1985, TVA replaced cyclones and lower furnace walls, including headers and the floor at Paradise Units 1, 2, and 3.
- In 1988, TVA replaced the economizer and superheater outlet pendant elements in the
 "A" and "B" furnaces at Bull Run.
- In 1989, TVA replaced and redesigned the secondary superheater pendant elements,
 reheater elements, and crossover elements at Widows Creek Unit 5.
- Between 1989 and 1990, TVA replaced and redesigned the secondary superheater and the reheater pendant and crossover elements (including header stubs) at Shawnee Units 1 and
 4.

² With regard to the Citizens' complaint, these claims exclude what was decided by this Court in *Nat'l Parks Conservation Ass'n v. TVA*, No. 3:01-cv-71, 2010 WL 1291335 (E.D. Tenn. March 31, 2010).

- Between 1989 and 1990, TVA replaced superheater crossover tubes, lower horizontal and side waterwall tubes of the superheater and reheater furnace, all superheater intermediate pendant elements, and all reheater intermediate pendant elements at Kingston Units 6 and 8.
- In 1992, TVA replaced the reheater at Allen Unit 3 with a redesigned reheater.
- In 1994, TVA replaced the secondary superheater outlet header, the secondary superheater pendant elements, and the lower waterwalls at Cumberland Unit 2.
- In 1996, TVA replaced the secondary superheater outlet header, the secondary superheater pendant elements, and the lower waterwalls at Cumberland Unit 1.
- In 1996, replaced all of the waterwall tubes in the front, rear, and sidewalls, and all of the burner tube panel in both furnaces of John Sevier Unit 3. TVA also replaced superheater platen elements at that unit.

The plaintiffs allege that these actions were physical modifications resulting in significant net increases in emissions of SO₂, NO_X and/or PM, requiring TVA to obtain NSR permits, obtain BACT and/or LAER emission limits, and comply with other NSR requirements. The plaintiffs further allege that certain of these modifications triggered NSPS and/or minor NSR requirements. Finally, the plaintiffs allege that the emission limits and other requirements resulting from these permitting processes should have been incorporated into TVA's Title V permits. TVA has not yet filed an answer, but maintains that none of the identified actions violated NSR or related requirements. *See* Proposed Consent Decree at 5.

IV. TERMS OF THE SETTLEMENT

A. Emission Reductions

The central feature of the Consent Decree is the requirement that TVA reduce emissions of SO_2 and NO_X on a system-wide basis. To effect this mandate, and to provide TVA with operational flexibility, the settlement establishes aggregate emissions caps for TVA's 59 coal-fired units. Compliance with these caps is measured on an annual basis, which will allow TVA to vary system operations as necessary throughout the year. The 2011 NO_X cap is 100,600 tons and it declines annually to its final level of 52,000 in 2018. The 2011 SO_2 limit is 285,000 tons, declining to 110,000 tons in 2019.

The agreement also requires specific controls at specific units on a staggered schedule, ending in 2018. By that date, at most of its coal-fired units, TVA must either (a) install new or operate existing state-of-the-art pollution controls such as selective catalytic reduction devices ("SCRs") to reduce NO_X emissions and/or flue gas desulfurization devices ("FGDs" or "scrubbers") to reduce SO₂ emissions; (b) retire the unit; or (c) repower the unit to burn renewable biomass instead of coal. More specifically, with respect to NO_X, over 60 percent of TVA's current coal-fired system is already equipped with SCRs. By the end of 2018, an additional 30 percent will be retired, retrofitted with SCRs, or repowered to renewable biomass. For SO₂, over 50 percent of TVA's current coal-fired system is already equipped with FGDs. By the end of 2018, an additional 40 percent will be retired, retrofitted with FGDs, or repowered to renewable biomass.

The agreement provides for the permanent retirement of 18 coal-fired units, equating to about 16 percent of TVA's coal-fired electricity generating system. For all other units, the agreement requires continuous operation of all new and existing SCRs and FGDs. The

agreement also specifies that TVA must complete optimization studies for existing PM controls to maximize PM emission reductions to the extent practicable. In addition, TVA must surrender annually certain excess marketable NO_X and SO_2 emissions allowances that result from actions taken under the Consent Decree.

B. Civil Penalty

The Consent Decree will require TVA to pay a civil penalty of \$2 million – \$1 million to Tennessee, and \$500,000 each to Alabama and Kentucky. TVA will pay an additional \$8 million penalty to EPA under the above-referenced CAFO.

C. Resolution of Claims

The Decree generally resolves all of the civil claims arising from alleged modifications undertaken at TVA coal-fired units prior to April 14, 2011, the date of the lodging of the Decree with the Court.

D. <u>Environmental Mitigation Projects</u>

This Consent Decree requires TVA to spend \$60 million on environmental mitigation projects to address the impacts of past emissions, providing a benefit to communities affected by TVA's emissions. This money will be distributed by TVA to Alabama, Kentucky, North Carolina, and Tennessee for these States to implement projects of their choosing from a list of categories in the Consent Decree. These listed projects are primarily alternative energy and energy conservation projects. They include development of solar, wind, geothermal, combined cycle and landfill gas energy sources; energy conservation measures for new and existing buildings; agriculture projects such as biofuel development and anaerobic digestion to replace conventional fuels; and mobile source projects to reduce vehicle use and promote alternative vehicle fuels.

Furthermore, pursuant to the FFCA with EPA, TVA will spend \$290 million on a number of environmentally beneficial projects including \$240 million on projects designed to increase efficiency in transmission and demand-side supply to displace utilization of coal-fired electricity generation; \$40 million to reduce greenhouse gases and other pollutants through renewable energy projects such as waste heat recovery, electric vehicle and plug-in hybrid electric charging stations, and solar photovoltaic installations, and landfill or waste treatment methane gas capture and generation; \$8 million for a clean diesel retrofit and electric vehicle project; and \$1 million each to the National Park Service and the National Forest Service to improve, protect, or rehabilitate park and forest lands that have allegedly been injured by emissions from TVA's plants, including Mammoth Cave National Park and Great Smoky Mountains National Park (Park Service) and Cohutta Wilderness Area, Linville Gorge Wilderness Area, Shining Rock Wilderness Area, Sipsey Wilderness Area, and Joyce Kilmer-Slickrock Wilderness Area (Forest Service). TVA estimates that this package of projects will reduce annual emissions of SO₂ by 96,000 tons, NO_X by 25,000 tons, mercury by 800 pounds, and carbon dioxide by 30,000,000 tons.³

V. <u>ARGUMENT</u>

A. The Standard for Evaluating a Consent Decree is Whether the Decree is Fair, Adequate and Reasonable, and Consistent With the Public Interest.

The standard the Court should apply in reviewing the proposed Consent Decree is whether "the decree is 'fair, adequate, and reasonable, as well as consistent with the public interest." *United States v. Lexington-Fayette Urban County Gov't*, 591 F.3d 484, 489 (6th Cir. 2010) (quoting *United States v. County of Muskegon*, 298 F.3d 569, 580-81 (6th Cir. 2002) (quoting *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351 (6th Cir. 1986))).

³ See http://www.epa.gov/compliance/resources/cases/civil/caa/tvacoal-fired.html (last visited June 15, 2011) [hereinafter "EPA Web Page"].

Lexington-Fayette represents a recent application of this standard to a consent decree resolving a federal Clean Water Act enforcement action.

In analyzing whether a settlement is fair, the Sixth Circuit focuses on "the strength of plaintiff[s'] case, the good faith efforts of the negotiators, the opinions of counsel, and the possible risks involved in the litigation if the settlement is not approved." Lexington-Fayette, 591 F.2d at 489 (quoting United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1435 (6th Cir. 1991)). As for the reasonableness factor, the Sixth Circuit notes that, for consent decrees to enforce environmental protection statutes, "[o]ne of the most important considerations when evaluating whether a proposed consent decree is reasonable is 'the decree's likely effectiveness as a vehicle for cleansing' the environment." *Id.* (quoting Akzo, 949 F.2d at 1436). In analyzing whether the settlement is in the public interest, the "district court must consider whether the decree is 'consistent with the public objectives sought to be attained by Congress." Id. at 490 (quoting Williams v. Vukovich, 720 F.2d 909, 923 (6th Cir. 1983)). Finally, the Sixth Circuit has observed that "public policy generally supports 'a presumption in favor of voluntary settlement' of litigation." Id. at 490-91 (quoting Akzo, 949 F.2d at 1436). In this case, the Decree is virtually identical to an agreement TVA negotiated with EPA. "EPA . . . enjoys substantial expertise in the environmental field," therefore, "the presumption in favor of settlement" is heightened. See id.

B. The Consent Decree is Fair.

By the standards set forth in *Lexington-Fayette*, the proposed Consent Decree is fair. The parties clearly differ about the strength of the plaintiffs' case. Plaintiffs, of course, strongly support their case. Most of the claims in the complaints stem from physical alterations that EPA has found to be major modifications subject to the NSR program and other requirements. *See In*

re TVA, 9 E.A.D. 357, 2000 WL 1358648 (EPA ALJ Sept. 15, 2000), motion to dismiss denied by TVA v. EPA, 278 F.3d 1184 (11th Cir. 2002), opinion withdrawn in part by TVA v. Whitman, 336 F.3d 1236 (11th Cir. 2003), cert. denied, 541 U.S. 1030 (2004). Defendant TVA just as strongly contests plaintiffs' allegations and believes that it would be able to successfully defend these allegations. Because, "as in any lawsuit, plaintiffs have no guarantee of ultimate success," United States v. Hooker Chemicals & Plastics Corp., 540 F. Supp. 1067, 1080 (W.D.N.Y. 1982), the parties have decided to end their dispute.

The agreement was negotiated in good faith. Negotiation of the agreement took over one year to complete, with active participation by two agencies of the federal government (EPA and TVA), four States, and interested citizen groups. As the Court is aware, a number of the parties have been at odds, and their willingness to come together now is unmistakable evidence of the good faith involved in the negotiations.⁵

Further confirmation of the fairness of the Decree comes from the supportive opinions of the lawyers who long labored over this matter. Many of the lawyers involved in crafting the agreement have been involved in NSR issues for a long time. These lawyers are well-versed in the liability and remedy issues associated with this type of litigation, and their support of this agreement speaks volumes as to its fundamental fairness. *See San Antonio Hispanic Police Officers' Org. v. City of San Antonio*, 188 F.R.D. 433, 461 (W.D. Tex. 1999) (counsel "possess the unique ability to assess the potential risks and rewards of litigation, and a presumption of

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⁴ The Eleventh Circuit held that this EPA administrative proceeding violated due process, and therefore, EPA's orders were not "final agency action." *Whitman*. 336 F.3d at 1260.

In cases in which the United States is a plaintiff, another manifestation of good faith is the government's willingness to consider public comment regarding the agreement. *Lexington-Fayette*, 591 F.3d at 489. The United States is not a plaintiff here and EPA is not a party to this Consent Decree. The EPA, however, did take public comment on the essentially identical FFCA that it entered into with TVA. *See* 76 Fed. Reg. 22,095 (April 20, 2011). After carefully considering those comments, EPA determined that no changes to the agreements are warranted. *See* http://www.epa.gov/compliance/resources/cases/civil/caa/tvacoal-fired.html#comment (last visited June 15, 2011).

correctness is said to attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery") (quoting *Lelsz v. Kavanaugh*, 783 F. Supp. 286, 297 (N.D. Tex. 1991), *aff'd*, 983 F.2d 1061 (5th Cir. 1993)). Such representation ensures that the settlement is fair to the client-signatories to the Consent Decree.

The possible risks involved if the settlement is not approved are significant. Many of the claims in this case were first identified by EPA through a notice of violation issued in 1999. Since then, pieces of the underlying dispute have resulted in one trial in this court, Nat'l Parks Conservation Ass'n v. TVA, No. 3:01-cv-71, 2010 WL 1291335 (E.D. Tenn. March 31, 2010) (appeal pending), an extensive administrative proceeding, In re TVA, 9 E.A.D. 357, 2000 WL 1358648 (EPA ALJ Sept. 15, 2000), one opinion by the Sixth Circuit, Nat'l Parks Conservation Ass'n v. TVA, 480 F.3d 410 (6th Cir. 2007), and three by the Eleventh Circuit, TVA v. EPA, 278 F.3d 1184 (11th Cir. 2002), TVA v. Whitman, 336 F.3d 1236 (11th Cir. 2003), cert. denied, 541 U.S. 1030 (2004), and Nat'l Parks Conservation Ass'n v. TVA, 502 F.3d 1316 (11th Cir. 2007), cert. denied, 554 U.S. 917 (2008). Moreover, North Carolina has sought emissions reductions from TVA's facilities on state common law grounds in a separate matter. See North Carolina ex rel. Cooper v. TVA, 515 F.3d 344 (2008), appeal after remand, 615 F.3d 291 (4th Cir. 2010), pet. for cert. pending, No. 10-997 (filed Feb. 2, 2011). A petition for certiorari to the United States Supreme Court is pending in that case. In addition, EPA is currently reconsidering the denial of North Carolina's petition under section 126 of the Clean Air Act, 42 U.S.C. § 7426, which targets SO₂ and NO_X emissions from coal plants in more than ten states, including all of TVA's coal-fired power plants. See Judgment, Sierra Club v. EPA, 313 Fed. Appx. 331, 2009 WL 585646 (D.C. Cir. 2009).

This settlement is the culmination of this vigorous litigation. Without it, the underlying dispute will likely continue for years with the different parties continuing to incur substantial litigation costs and with TVA exposed to substantial legal risks.

C. The Consent Decree is Adequate and Reasonable.

The essential measure of a consent decree resolving an environmental dispute is whether the agreement is an effective vehicle for cleansing the environment. *Lexington-Fayette*, 591 F.2d at 489. Here there can be no doubt regarding the robust nature of the agreement. Under the Decree, TVA will be reducing NO_X emissions from its coal fleet by over 115,000 tons per year from 2008 levels. Similarly, SO₂ emissions will decline by over 225,000 tons per year. Overall, emissions of these pollutants will decrease by over 65% from 2008 levels. *EPA Web Page*, *supra*. Once the Decree is fully implemented, 92% of TVA's coal fleet will either be controlled with SCRs and FGDs, retired, or converted to renewable biomass. In addition, as a result of the \$350 million in environmentally beneficial expenditures to which TVA has committed, SO₂ emissions will decline by an additional 96,000 tons per year, while NO_X emissions will be reduced by 25,000 tons per year. (The benefits to human health and the environment from these reductions are discussed in the next section).

At the same time, the settlement is clearly a compromise. Rather than imposing specific emission limits at individual units that would reflect the statutory standards of "best available control technology" or "lowest achievable emission rate," the agreement allows TVA a great deal of flexibility to control facilities to a greater or lesser extent, or even to close them. The Decree allows for this flexibility by setting emission caps for TVA's entire system instead of establishing unit-specific emission limits. The Decree also does not require TVA to perform detailed modeling analyses called for by the NSR program. The structure of the settlement

ensures that TVA can flexibly achieve the required emission reductions as cost-effectively as possible consistent with its congressional mandates. All of the parties to the Consent Decree believe that the approach taken here is adequate and reasonable.

D. The Consent Decree is in the Public Interest.

Entry of the proposed Consent Decree would be in the public interest. The Sixth Circuit has focused on three criteria to ensure that this element is properly considered: (1) whether the agreement is voluntary; (2) whether agencies with experience in the environmental field have been involved in the negotiations; and (3) whether the objectives of Congress are being attained. *Lexington-Fayette*, 591 F.2d at 490-91. The Decree satisfies each of these of requirements.

First, all of the parties, including TVA, have voluntarily entered into this settlement.

Second, not only have the environmental agencies of each of the Plaintiff States actively participated in crafting this agreement, but the federal environmental agency, EPA, has participated as well and has entered into the FFCA with TVA which is essentially identical to the proposed Decree.

Third, two Congressional enactments are being served through this agreement, the Clean Air Act and the Tennessee Valley Authority Act. One of the main purposes of the Clean Air Act is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401. In turn, one the fundamental purposes of the Tennessee Valley Authority Act is to develop the Tennessee Valley region's resources and economy. 16 U.S.C. § 831n-4(h); *see also United States ex rel. TVA v. Welch*, 327 U.S. 546, 553 (1946); *4-County Elec. Power Ass'n v. TVA*, 930 F. Supp. 1132, 1135 (S.D. Miss. 1996). The TVA Act also provides TVA broad discretion to settle all claims and litigation against it. 16 U.S.C. § 831h(c).

In accordance with the TVA Act, TVA recently completed its 2011 Integrated Resource Plan ("IRP"), entitled "TVA's Environmental and Energy Future." Developing this plan required the use of comprehensive economic least-cost modeling and consideration of potential financial and environmental effects. The IRP process included widespread public participation and opportunities for public comment. The IRP's goals are to further diversify TVA's generation resources by expanding energy efficiency and demand side options, pursuing cost-effective renewable energy, increasing the contribution of nuclear and natural gas generation and reducing its reliance on generation from older, coal-fired power plants. These goals align well with the requirements of the Consent Decree.

The public health benefits of this agreement are tremendous according to EPA's analysis. As indicated above, compared to TVA's 2008 levels, TVA will reduce its NO_X and SO₂ emissions by about two-thirds when the agreement is fully implemented. *See EPA Web Page*, *supra*. According to EPA, the annual benefits of these reductions include avoiding 1,200 to 3,000 premature deaths, 2,000 non-fatal heart attacks, 800 cases of chronic bronchitis, 960 hospital admissions, 1,200 emergency department visits for asthma, 1,900 cases of acute bronchitis, 21,000 asthma attacks, 39,000 cases of upper or lower respiratory symptoms, 150,000 missed work days, and 880,000 individual restricted activity days. *Id*. These figures reflect the human health benefits from reducing exposure to ambient PM_{2.5} by reducing precursor pollutants like NO_X and SO₂. Health effects from direct exposure to NO_X, SO₂ and ozone, visibility effects, and ecosystem effects are not included. *Id*.⁷ The settlement will also significantly reduce coarse particulate matter, mercury and carbon dioxide emissions. *Id*.

⁶ See http://www.tva.com/environment/reports/irp/index.htm (last visited June 15, 2011).

⁷ The estimation techniques used by EPA are based on national average benefits that result from reducing emissions from power plants. These estimates may not reflect local variability in population density, meteorology, exposure, baseline health incidence rates, or other local factors that would affect the actual benefits. *See EPA Web Page*, *supra*.

EPA has estimated that the monetized health benefits of these emission reductions range from \$11 to \$27 billion (in 2010 dollars) per year. *Id.* These benefits will be realized primarily in the Tennessee Valley region and will accrue to governments at all levels and to individual citizens as well. The mitigation projects will also primarily benefit local communities in the Tennessee Valley area. Therefore the agreement is consistent with both the Clean Air Act and the TVA Act.

VI. <u>CONCLUSION</u>

For the reasons set forth above, the parties' joint motion to enter the consent decree should be granted.

Respectfully submitted this 16th day of June 2011,

For the STATE OF TENNESSEE

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(Signatures continued on next page)

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